U.S.SUPREME COURT UPDATE
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FOR TRIAL DOGS

By: Richard M. Wintory

Herring v. United States (see page 4 of NAAG summary): A new way to argue motions to suppress.

OK, ONLY A LIBERAL PRESS COULD HAVE REPORTED THIS DECISION WITHOUT A HEADLINE LIKE, "CITING HIGH COST TO TRUTH SEEKING AND PUBLIC SAFETY, HIGH COURT SHARPLY LIMITS EXCLUSION OF EVIDENCE TO CASES OF DELIBERATE OR RECKLESS POLICE MISCONDUCT."

ALL TRIAL DOGS (EVEN defense attorneys) know the score: warrantless searches and seizures are presumed unreasonable and the fruits of a search we can't prove falls into an exception will be suppressed. Period. "Good faith mistakes or misjudgments by officers have seemed irrelevant to the inexorable command that, contrary to Benjamin Cardozo's plea, "the criminal should go free because the constable blundered."

Well, no more. This case staged a rematch of an 80-year-old fight between two judicial heavy weights, Benjamin Cardozo and Henry J. Friendly on one side and the exclusionary rule on the other. In a split decision (5-4) the Court holds that as Friendly and Cardozo advocated, to "trigger the exclusionary rule the police conduct must be **sufficiently deliberate** that exclusion can meaningfully deter it, and **sufficiently culpable** that such deterrence is worth the price paid by the justice system. (See page 9).

As for that price and the burden on those defendants' lawyers asking innocent victims to "foot the bill", the court notes,

The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free — something, that "offends basic concepts of the criminal justice system." Leon, supra, at 908. "[T]he rule's costly toll upon truth-seeking and law enforcement objectives ***presents a high obstacle for those urging [its] application.*****"(See page 6 of the opinion)**

Therefore, we need to argue motions to suppress differently if we and the judges we're responsible to educate are going to follow the law. (Which is what we're all supposed to do, right?)

For a defendant to win a judge's order excluding evidence of his guilt from the jury's consideration, a defendant must

1. establish standing(his burden)
2. prevail on the question that his Fourth Amendment rights were violated(his burden if search was with a warrant, ours if it wasn't)
3. Establish the police conduct was sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system...." As laid out in our cases, the exclusionary rule serves to deter *deliberate, reckless, or grossly negligent* conduct, or in some circumstances recurring or systemic negligence. (see page 9)

'to get a feel for the kind of conduct justifying the rules' application as "laid out in our cases" consider the Court's examples, police burglarize i.e. breaking and entering defendant's homes without any warrants (or false ones) as in *Weeks, Mapp* and *Silverthorne Lumber Company* and ransacked these homes for evidence without any pretense of legality (See pages 7&8 for ugly details)

Points to consider for judges hell-bent on excluding upon any violation:

- First, the exclusionary rule is not an individual right and can be only applied on a case-by-case basis, and only where it "'result[s] in appreciable deterrence.'" We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation (page 5) and that possible benefit must be weighed against the societal cost. (id)
- Trial dogs must be prepared to go to bat for our cops when the violation arose from a mistake or negligence rather than a deliberate, flagrant or tactical move. *"Evidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'"*(See page 8) We should be ready also to prove and argue the costs to society of letting the criminal go free aren't outweighed by the possible benefit of deterrence.
- We should prevail in those situations where the violation is not of a (to borrow the phrase from AEDPA) "a right clearly established by the Supreme Court," think of vehicle searches incident to arrest before *Arizona v Gant.*
- In addition, cases where the officer made a judgment based on facts, believing they constituted probable cause or reasonable suspicion. I believe we have an argument here that a reasonable (even if wrong in the view of the court) belief of legal justification for a search or seizure is a far cry from the flagrant, rough raiding of the cases cited by the court. Suppression in such cases offers little deterrence to an officer who knows and believes he was following the law but differs with a Monday morning view of whether he or she had enough facts.
- It'll also be fun to talk about the price of letting "guilty and possibly dangerous" criminals go free, something that offends the basic concepts of the criminal justice system"(page 6) so, be ready to talk about this criminal, his record and possible dangerousness to help the court perform its solemn duty of weighing these costs with the possible benefits. Should be a lot more fun than just taking our lumps, huh?

Arizona v. Gant (see page 9 of NAAG summary)

A couple of years ago, in discussing Thornton v. United States, I said,

Good news: The Supreme Court expands *Belton* to those cases where the arrestee gets out of the car before we can stop and arrest him. Bad news: Scalia with

Ginsburg (no, it's not a typo) and O'Connor agree with Stevens and Souter that *Belton* searches for evidence unrelated to the arrest violate the 4th Amendment. BOLO (be on the lookout) for a *Crawford*-like alliance sometime in the future that overrules *Robinson v. California* and restricts searches incident to the arrest- including *Belton* searches- to searching for evidence of the arrestee's crime.

Sometimes, I hate being right. Justice Scalia, hooking up with his Crawford coalition, (Justices Thomas, Ginsburg, Souter and Stevens) gets his wish from *Thornton*. *Belton* searches are now limited to looking for evidence of the crime of arrest which "might" be in an arrested occupant's vehicle. Of course, when the arrest is for a traffic offense for which no evidence could be found - no search. Worse, because the Court concludes officers routinely secure arrestees (duh) they can no longer search vehicles for articles that might have been hidden before they were arrested. Any good news? Only that the Court reaffirmed the vitality of automobile exception searches based on probable cause under *United States v. Ross*, 456 U.S. 798, and "frisks of the passenger compartment for weapons based on reasonable suspicion in non-arrest cases under *Michigan v. Long*.463 U.S. 103.

Arizona v. Johnson (see page 6 of NAAG summary): A makeup call.

After the bitterly disappointing outcome in *Arizona v. Gant*, trial dogs – particularly those from Arizona felt we were owed a makeup call from the league officials. That's what this unanimous opinion reads like written by Judge Ginsburg of all people, a liberal, anti-law enforcement lower court, (Arizona Court of Appeals Division 2) gets a 9th Circuit-style smack down, while trial dogs get language so clear, that even the most public safety challenged judge will have a hard time ignoring the key holdings, which include:

- Officers have a right to make traffic stops, even when they are special investigative units, like this anti-gang squad without fear of losing based on "pretext" (ok, not new but *U.S. v. Whren* is a golden oldie.)
- The valid traffic stop gives stopping officers the right to detain the driver and all passengers for the time it reasonably takes to work the stop.
- Driver and passengers may be removed from the vehicle with no additional factual justification than the traffic stop due to the dangers inherent in such stops and the minimal intrusion on those already stopped.
- Occupants can be asked for identification which can be used for computer checks for wants, warrants etc.
- If the officer's observations viewed through their training and experience cause them to believe either the driver or passengers may be armed or dangerous, they may pat them down or frisk for weapons even without a suspicion they're engaged in or committed an offense.
- Officers may question, converse, shoot the breeze or otherwise troll for evidence completely unrelated to the traffic offense with no additional justification, as long as the process doesn't "meaningfully prolong the detention." Practice pointer: encourage our officers to question the stopped vehicle's occupants while waiting for returns on computer checks; a period of

time police clearly have a right to hang on to folks and no one can claim questioning while waiting is "prolonging the stop."

Safford Unified School District #1 v. Redding (see page 19 of NAAG summary)

Supreme Court to school-based drug pushers: there is safety in knickers.

A testament to all that makes Justice Souter the jurist he was.

In response to what was inarguably reasonable suspicion that a 13 year old female student was carrying contraband pills on her person or in her belongings, which were going to be taken over a noon hour; school officials ultimately had her, in a nurse's office, in the presence of female school officials shake out her bra and panties to confirm the absence of contraband. Justice Souter supports along with the majority

1) the ban on even non-prescription pills in school,
2) school officials with a reasonable suspicion may search outer clothing and belongings for contraband.
3) that the school officials in this case were motivated by nothing more than a desire to protect other students from also being sickened by the use of contraband pills.

Despite this, the Court finds that before a search beyond the outer clothing (labeled here as a "strip search") school officials must suspect danger to students from either the suspected drug's power (as in LSD or heroin, presumably) or quantity (obviously never marijuana) or specific reason to suspect drugs are hidden beneath outer clothing is required. Information the person is distributing concealable drugs they would not want to be caught with or that inner clothing is a logical place to hide them is insufficient.

As a parting gift Justice Souter gives us an opinion that tells all so inclined the safest place to secrete contraband in school, and warned school officials to keep hands off or else. Thanks and so long.

Montejo v. Louisiana (see page 12 of NAAG summary): Another exclusionary rule bites the dust.

- One of the great protections guilty and often dangerous criminals have enjoyed have been the barriers erected between them and police questioning together with rules excluding demonstrably consensual confessions by criminals wanting to take responsibility for their actions and admit their wrongdoing. One of these rules was *Michigan v. Jackson*, which, as Justice Scalia describes, added to a regime, that starts with *Miranda's* requirement of warnings and a waiver prior to custodial interrogation, and next requires that If a lawyer is requested, all questioning must cease unless and until a lawyer is present, *Edwards, Arizona*, 451 U.S. 477, Talking to the lawyer is insufficient, *Minnick* 498 U.S.153

- *Jackson* said a defendant could not validly waive his lawyer's presence during questioning once he had asked for a lawyer to be appointed at his arraignment.

Based on the presence of the three levels of protection offered by *Miranda, Edwards* and *Minnick,* the Court holds *Jacksons'* extra barrier wasn't worth the price paid in preventing police from obtaining the "unmitigated good" of voluntary confessions and thus overruled *Jackson*.

So here's where we stand:

- The request for and the appointment of a lawyer at an arraignment, etc. does not prevent police from approaching a defendant and seeking a waiver.' And a waiver using *Miranda* warnings "typically does the trick"(see pages 7&19)
- For those defendants who are out of custody post arraignment, even *Miranda* isn't required despite the defendant being represented (see page 16), nor is a waiver required if the contact with an in custody defendant doesn't constitute "interrogation" (such as a line up. See id)
- Even if a lawyer is appointed at the arraignment and not present when police approach and request an interview, a subsequent waiver is not invalid (page 9 fn. 2)
- A defendant may not invoke the right to counsel at, for example, an arraignment in anticipation of being questioned later, a valid invocation can only come "when the defendant is approached for interrogation-"(see page 18)
- Police may obtain a valid waiver of counsel after the right to counsel has attached and a lawyer appointed, even though the prosecutor could not conduct or cause an interview without violating the Model Rules of Professional Conduct Rule 4.2. Because the constitution does "not" codify the Rules or make investigating police officers lawyers (see page 11).

Good stuff, huh?

Kansas v. Ventris (see page 11 of NAAG summary)

Whining that this case "is another occasion in which the Court has privileged the prosecution at the expense of the constitution," dissenting Justice Stevens decries the Court limiting the exclusionary rule for statements obtained by a jailhouse informant during uncounseled, post-indictment interrogations to our case-in chief. The Court's holding does allow these statements to be used to impeach testilying defendants. So why we might ask Justice Stevens are constitutional values more compromised by use of these voluntary statements than a defendant being free to commit perjury, uncontradicted by his own words?

Vermont v. Brillion (see page 7 of NAAG summary)

In a domestic violence case with a jailed defendant that took 3 years to get to trial, the Vermont Supreme Court held Brillion's speedy trial rights were violated mostly

because the *State* was to blame for court appointed counsel's requests for delay and withdrawals and their general failure to "move" the case forward. In an effort to save public defenders from themselves, Justice Ginsburg reverses saying, whether appointed or retained defense counsel delays are attributable to their client, not the State. Otherwise, she explains, defense attorneys would be induced to "game" the system looking for a dismissal, and trial judges, fearing this would deny even meritorious continuances. Finally, Justice Ginsburg says it weighs heavily against defendant's claim, when he makes or keep a lawyer on a case by firing or threatening to murder them as this wife beater did.

Hedgpeth v. Pulido (see page 21 of NAAG summary)

A reverse and remand slap at the nutty ninth for ignoring their duty to ask whether a defendant was actually harmed by a typo in a jury instruction. It's fun to see nitpickers nitpicked.

Waddington v. Sarausad (see page 22 of NAAG summary)

Again, with the Ninth Circuit! The Court reverses their overturning the conviction of a driver in a drive by shooting for not listening: "we have repeatedly held that 'it is not the province of a Federal Habeas Court to reexamine state-court determinations on state-law questions.'"

Knowles v. Mirzayance (see page 24 of NAAG summary)

Memo to defense counsel: you are not providing "ineffective assistance of counsel by not making or abandoning defenses that have "virtually no chance of success". Neither does the law "require counsel to raise every non-frivolous defense." This holding despite the Ninth Circuit's description of the record below which was "at best misleading" ouch.

Rivera v. Illinois (see page 8 of NAAG summary)

Prosecutors wanting to attack bigoted defense strikes often hesitate out of fear of causing error if they succeed and the judge disallows a defense peremptory. Finally, a Batson case good for prosecutors. A Hispanic defendant is convicted for killing a young African American. The judge, sua sponte blocks a defense strike of an African American woman (who ends up being the foreperson) who was not challenged for cause. The Illinois Supreme Court ruled the trial court erred in not allowing the strike and but said the error was harmless because the juror was qualified and not biased. The U.S. Supreme Court holds because there is no constitutional right to *any* peremptory challenges, an error in denying one resulting in a jury that was still qualified and unbiased isn't a violation of the constitution. To hold otherwise would "discourage trial courts and prosecutors from policing a defendant's discriminatory use of peremptory challenges. The Fourteenth Amendment does not compel such a trade off."

Yeager v. United States (see page 15 of NAAG summary)

You try a defendant on multiple counts, the jury, in their infinite wisdom, acquit on some counts and hang on others. The defendant attempts to block a retrial based on the double jeopardy clause. Justice Scalia mocks the majority's claim the Court has founded its rule in such cases on the "common law ancestry of the Double Jeopardy clause rather than its brief text" "Would that it were so," Justice Scalia bemoans. Indeed, under the common law if a jury acquitted a man for stealing a horse, he could be tried again for stealing the saddle! However, as he noted that is water over the dam. The test for trial dogs is difficult to understand but tough on the defendant, he's got to identify an issue he says can't be retried in the hung counts and then establish there was no other finding a rational jury could have used to acquit him. In this case, where a defendant from the Enron fiasco was prosecuted (but acquitted) of fraud counts and the jury hung on insider trading counts. The Court remanded with a strong suggestion for the Court of Appeals to see if the jury could have based their acquittal on the conclusion the defendant wasn't the one who made the fraudulent statements (which would leave unresolved whether he had inside info and thus would allow a re-trial) or rather was their verdict based on finding he lacked any insider knowledge, an essential element in a retrial which would therefore be barred. (see page 9).

Melendez-Diaz v. Massachusetts (see page 17 of NAAG summary): The half-wit prince

Like Harry Potter, Crawford sequels just keep coming. Justice Scalia reprises his role as Dumbledore, and is joined by his old pals from Crawford, Hermione (played by Justice Ginsburg) Lord Voldemort (Justice Stevens, of course) Hagrid (Justice Thomas, loyal to a fault) Professor Snape (Justice Souter in his last performance.) discover in a dark corner of Hogwart's that lab reports are "testimonial" and require their author's testimony to be admitted. To underscore the need for the elevation of drug tests to the lofty status that requires confrontation through cross-examination, Justice Scalia helpfully cites studies and reports that describe how unreliable routine tests are and how easy they are to attack. (See pp 12-15) gee, with friends like these... on the other hand, Justice Kennedy joined by Alito, and Breyer launches an uncharacteristically frisky attack on our behalf decrying the impact of this formalistic reading of the confrontation clause will have in day to day prosecutions. In response, Justice Scalia confirms the constitutionality of "notice and demand" statutes that require the defense to object to disclosed reports well before trial or waive their Sixth Amendment Claim. (Note: the Court has granted cert on a case presenting just this issue for this term. See *Briscoe v. Virginia*) But otherwise he not only doesn't care, he goads defense attorneys into reading his studies and coming after us, so, be prepared.

Cone v. Bell (see page 25 of NAAG summary)

In his third trip to the Supreme Court in the nearly 30 years since his conviction and death sentence, a ruthless killer once again loses but still earns what all death penalty recipients want, more delay. The reason? A failure to turn over witness statements of marginal relevance to a marginal insanity defense, so marginal, the

Court determines they do not justify disturbing the conviction, but do warrant ordering yet another review of the death sentence. The lesson? The only way to avoid result-oriented analysis of whether undisclosed information/reports, etc is *Brady* material is to turn it all over. One nice thing here is Chief Justice Robert's diss of the ABA,

"In considering on remand whether the facts establish a *Brady* violation, it is clear that the lower courts should analyze the issue under the *constitutional* standards we have set forth, not under whatever standards the American Bar Association may have established. The ABA standards are wholly irrelevant to the disposition of this case, and the majority's passing citation of them should not be taken to suggest otherwise."

(See Roberts concurring page 2)

Bobby v Bies (see page 27 of NAAG summary)

A solid ruling from a unanimous Court, pulling the Sixth Circuit off of Ohio's attempt to give the State an opportunity to prove a child rapist/murderer isn't retarded enough to spare him from a death sentence. Repeatedly quoting the dissent of the one non-retarded member of the Sixth Circuit, The Court holds the Ohio Supreme Court's pre Atkins finding the defendant's mild retardation was a mitigator but one that didn't outweigh the aggravators doesn't preclude Ohio prosecutors from contesting his retardation now that, since Atkins, we know that's the whole enchilada. In a pleasant surprise, Justice Ginsburg acknowledges that before Atkins prosecutors welcomed retardation claims and used them to support proving future dangerousness. Ahh, those were the days.

District Attorney's Office for the Third Judicial District v. Osborne (*see page 28 of NAAG summary*)

So you got a guy who gets convicted of rape, robbery and attempted murder, identified by the victim with the victim's property found in his home and two, count 'em two confessions including one to the parole board in a bid for release, whose lawyer tactically refused to further test semen samples with then available DNA tests because she thought it would hurt her attack on the i.d. Now, with nothing to lose he claims he has a freestanding Due Process right to test the sample now, without any limitations that might be imposed by state legislatures. Rejecting the Ninth Circuit's bid to pull the Federal Courts into writing new discovery rules for post conviction claims, the Court says state rules being adopted across the country weigh in favor of not "fixing", what ain't broke.

Corley v. United States (see page 32 of NAAG summary): One exclusionary rule survives.

Federal law has long required arrestees to be "promptly presented" to a magistrate. After the Court created exclusionary rules for confessions to require arrestees be warned of their rights and to enforce the prompt presentment Rule, in *Miranda* and

Mallory/McNabb, Congress passed 18 USC 3501 seeking to overturn *Miranda* and limit *Mallory/McNabb*.

In *Dickerson v. U.S.* the Court held, Congress was powerless to end *Miranda's* exclusion of statements. Now, the Court rules Congress wasn't clear enough it intended to gut *Mallory/McNabb's* exclusion of voluntary statements obtained more than 6 hours after an arrest. The implicit suggestion is that if at first Congress did not succeed...

Dean v. United States (see page 34 of NAAG summary): Accidents happen but so do consequences.

Congress first enacts a mandatory minimum sentence for drug traffickers and other criminals "carrying" guns during their crimes. The Court in *Bailey v. U.S.* 516 U.S. 137 (1995) held that "carrying" or "use" required some "active employment" of the gun and gave a list of examples. So in the "Bailey Fix" Act Congress criminalized the Court's list which included 'discharge" and added a flat 10 year sentence that runs wild with everything. But does the discharge have to be intentional? Or is even an accidental shooting enough. Comparing it to felony murder the Court reasons the foreseeable but unintended consequences of unlawful conduct are within Congress's reach. Some handy statutory construction analysis here for English majors.

Boyle v. United States (see page 38 of NAAG summary)

Former prosecutor Sam Alito offers a little help to those working Rico cases. Association in fact "enterprises" have been a little difficult to distinguish from run of the mill conspiracies leading some judges to take a "kitchen sink" approach requiring us to prove up the Mafia. That was advocated here by the defendant, part of a crew that pulled 30 different rips of night deposit boxes off and on over a 5 year period using different people, m/o/s and targets. The Court affirms a strong as horseradish jury instruction (helpfully quoted verbatim, see page 3 fn 1) that the Court says covers the bases and doesn't include requirements rejected such as a formal structure, separate beyond that inherent in the pattern of racketeering.

Pearson v. Callahan (see page 41 of NAAG summary): Not a good year for *stare decisis.*

Police from the unfortunately named Central Utah Narcotics Task force (you work out the acronym) send an informant into Pearson's house (with Pearson's consent) to 'hot buy' meth and then, after getting the bust signal, charge in and arrest him seizing dope and buy money. A commie judge ignores a slew of courts and rejects the "consent once removed doctrine" and suppresses the evidence, not satisfied with a wrongful acquittal Pearson sues everyone.

To clip a police officer for money damages under sec. 1983 a plaintiff must prove the officer violated a constitutional right of which the officer would have known about because the right was "clearly established". Police have qualified immunity when they can show they violated no right or that the right was not clearly established. In

Saucier v. Katz the Court had required lower courts to hear qualified immunity claims immediately to spare officers from having to defend a claim and to do so using a rigid "order of battle" resolving whether there was a violation before asking whether the right violated was "clearly established." This inflexible order has caused much complaint especially when as here, regardless of what the police did; there has been no clear resolution of the "consent once removed doctrine." Slugging Sam Alito puts Wood to Saucier and tells lower courts to use whatever order will quickly dispose of bogus claims. While the unanimous Court does not uphold the "consent once removed doctrine" they cite to the many courts that have, don't reject it and hold that officers relying on those courts that do, sure aren't violating a right that's "clearly established".

Van de Kamp v. Goldstein (see page 42 of NAAG summary)

So the bad guy get's convicted of murder behind the testimony of an informant named Fink (you can't make this stuff up). They fail to disclose Fink's a liar who'd been selling testimony in cases for years. Bad guy win's a habeas claim and gets released and of course, sues everyone. The claim includes the trial prep failure to turn over the impeachment and the failure of the supervisors to train prosecutors to not cheat and their failure to have an IT system that would automatically track and disclose impeachment material to the defense.

Fortunately, trial dogs have absolute immunity from even being sued for every rotten thing they're alleged to have done in prosecuting a case (note, but not administrative stuff or investigative things working with the cops, there we've only got qualified immunity) this includes all the horrible stuff like suppressing Brady material, encouraging false testimony, etc.

The Court holds that supervisors have to be immune for supervising any decision the trial dog is immune for otherwise they would produce the same intimidating impact indirectly defending the lawsuits would produce directly. Whew. Ditto the IT stuff based on the Garbage In principle, because, the decision about what kind of system or what info to put in it is still a trial dog decision.

Carperton v. A.T. Massey Coal Co. (see page 43 of NAAG summary)

39 states elect judges. This case holds that should a contributor directly or in coordination with others play a disproportionate role in the election of a judge before whom the contributor later appears and a reasonable probability of bias exists the Due Process Clause requires recusal of the judge. This could certainly include judges elected with the financial or political support of police or prosecutors; it's unclear if a claim could be made for a Due process claim by the state against a judge elected with overwhelming support of the defense bar. Despite assurances by the majority that this is an unusual and extreme case, the chief's observation that "hard cases make bad law" will be the one to remember.

Abuelhawa v. United States (see page 37 of NAAG summary)

So what's wrong with bootstrapping? A lot I guess, the Court puts the kibosh to the Feds using "wire counts" as felonies when the telephone is used to facilitate a misdemeanor i.e. to possess a small amount of drugs.

Flores-Figueroa v. United States (see page 35 of NAAG summary)

To commit Identity theft under a statute criminalizing the use of "another persons" Id requires us to prove the defendant "knew" the material belonged to another person thus giving a defense that the material was completely bogus and not a real persons. Thanks gang.

Oregon v. Ice (see page 3 of NAAG summary)

In the rare event where you find yourself in front of a judge willing to consider imposing consecutive sentences, this case holds that should additional fact finding be required to qualify the defendant for stacked time, jury findings of those facts are not required under the Sixth Amendment or *Apprendi*.